

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, TREASURER OF
PUERTO RICO, PETITIONER,

vs.

YABUCOA SUGAR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 2, 1938.

CERTIORARI GRANTED JANUARY 30, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 498

RAFAEL SANCHO BONET, TREASURER OF
PUERTO RICO, PETITIONER,

vs.

YABUCOA SUGAR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., First Circuit.....	1	1
Caption	1	
Record from District Court for San Juan, Puerto.....	1	1
Amended complaint	1	1
Demurrers to amended complaint.....	8	6
Order sustaining demurrers	9	7
Motion for reconsideration, etc.	10	8
Judgment	16	14
Notice of appeal to Supreme Court of Puerto Rico.....	17	15
Proceedings in Supreme Court of Puerto Rico.....	18	15
Judgment	18	15
Motion for reconsideration	19	16
Opinion of Court, Wolf, J., on motion for reconsideration.	23	20
Order denying motion for reconsideration.....	24	21
Memorandum re appeal papers.....	25	22
Assignment of error	25	22

JUDG & DETWEILERS (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 13, 1939.

INDEX

	Original	Print
Proceedings in Supreme Court of Puerto Rico—Continued.		
Translator's certificate (omitted in printing) ..	26	
Stipulation as to transcript of record.....	26	23
Clerk's certificate (omitted in printing) ..	27	
Memorandum re enlargement of time.....	27	23
Minute entry of hearing	28	23
Opinion, Bingham, J.	29	24
Concurring opinion, Wilson, J.....	34	29
Dissenting opinion, Morton, J.	40	34
Judgment	43	37
Recital as to issuance of mandate.....	44	37
Clerk's certificate (omitted in printing) ..	44	
Order excluding time within which to apply for writ of certiorari	45	37
Order allowing certiorari	46	37

[fol. 1] [Caption omitted]—

**IN DISTRICT COURT FOR THE JUDICIAL DISTRICT
OF SAN JUAN, PUERTO RICO**

Civil No. 18,886

YABUCOA SUGAR COMPANY, Plaintiff,

v.

**MANUEL V. DOMENECH, as Treasurer of Puerto Rico,
Defendant**

Refund of Taxes

AMENDED COMPLAINT—Filed July 11, 1933

To the Honorable Court:

Now comes the plaintiff in the above entitled case, by its undersigned attorney, and as its cause of action against Manuel V. Domenech, Treasurer of Puerto Rico, respectfully states and alleges:

I. That the plaintiff, Yabucoa Sugar Company, is a corporation created and organized under the laws of Puerto Rico.

[fol. 2] II. That the defendant, Manuel V. Domenech, is of legal age, and at present holds and fills the office of Treasurer of The People of Puerto Rico, a political entity organized in accordance with an Act of Congress of the United States of America, approved March 2, 1917, known as the Jones Act, the said Manuel V. Domenech having the rights and duties inherent to the office of Treasurer of Puerto Rico.

III. That for the taxable year 1927, that is, the fiscal year included between July 1, 1926 and June 30, 1927, the plaintiff filed with the Treasurer of Puerto Rico, for purposes of income tax, a return showing a taxable income of \$201,879.29, and at the request of the Treasurer of Puerto Rico paid to the treasury of the island the sum of \$25,234.92, as per receipt number 33 of the year 1927.

IV. That on October 31, 1928, the defendant notified the plaintiff having practiced an investigation in the books of account of the Yabucoa Sugar Company and requested the plaintiff to pay to the Treasurer of Puerto Rico the additional sum of \$1,301.51, besides the \$25,234.92 already paid, as per receipt No. 33 for the fiscal year 1927, that is on a

net taxable income of \$211,725.26 for said year, instead of the \$201,879.29 specified in the return filed by the plaintiff.

V. That the liquidation, as appears from the notice of deficiency prepared by the Treasurer and served on the plaintiff October 31, 1928, levying the said additional tax of \$1,301.51, is as follows:

Gross income, as shown by the books	\$2,093,716.31
Less Income not subject to taxation:	
Corporation dividends	\$794.50
Income Tax Reserve	5,527.60
Depreciation fund	1,210.00
	<u>7,352.10</u>
Total gross income	\$2,086,184.21
General deductions as per the books	\$1,883,285.51
Plus net loss for the year 1926	17,847.85
Total	<u>\$1,900,733.36</u>
[fol. 3] Less items stricken out:	
Income tax reserve	\$28,527.60
Depreciation fund	\$64,934.64
Liquid fund	63,774.64
	<u>1,210.00</u>
Donations	576.81
	<u>\$30,314.41</u>
Total general deductions	<u>\$1,840,458.95</u>
Total net income	<u>\$215,725.26</u>
Tax liquidation:	
12½% of \$211,725.26 (that is a net income of \$215,725.26 less \$4,000 exempted by law)	\$26,465.66
Interest at 6% per annum on a deficiency of \$1,230.74 (\$26,465.66 less \$25,234.92 previously paid)	<u>70.77</u>
Total tax and interest	<u>\$26,536.43</u>
Less tax paid as per receipt No. 33	<u>\$25,234.92</u>
Total tax and surcharges payable	\$1,301.51

VI. That from the assessment made by the Treasurer to which the foregoing paragraph of this complaint refers, the plaintiff appealed to the Board of Review and Equalization; and the latter in its session of December 23, 1929, as per notice served by the Board on the plaintiff, on January 16, 1930, decided the appeal as follows:

“San Juan, Puerto Rico, January 16, 1930.

Order

Income Tax.

Taxable Year 1926 and 1927.

Taxpayer: Yabucoa Sugar Company.

Town: Humacao, Puerto Rico.

GENTLEMEN:

I take pleasure in informing you that the appeal specified herein was decided by this Board of Review and Equalization in its session of December 23, 1929, as follows:

[fol 4] Year 1926

Repairs:

To consider the repairs charged on your books of account as of an incidental nature deductible in their entirety from the gross income, with the exception of the items hereinafter detailed, considered as improvements to the property:

Mills	\$15,119.48
Fixed rails	975.57
Locomotives	1,159.25
Supply pump	954.48
Total	\$18,208.78

Other Items:

As regards the other allegations it was agreed that the assessments made by the Finance Department be affirmed.

Year 1927

Net Loss for the Year 1926:

To grant as a deduction from the gross income, as loss for the year 1926, that resulting from the liquidation of said case in accordance with the resolution of this Board.

Other Items :

As regards the other items the Board agreed to affirm the assessment made by the Department of Finance.

Respectfully, A. Carrion, Acting Secretary, Board of Review and Equalization."

VII. That the Board of Review and Equalization in deciding the appeal of this plaintiff accepted all the items specified in the notice of deficiency prepared by the department of finance, transcribed in the first paragraph of this complaint, with the exception of the item "Repairs" for the year 1926, carried to the year 1927, the Board deciding that the total amount appearing in the books of the plaintiff company on that account be admitted, less \$18,208.78 mentioned in said order.

[fol. 5] VIII. That the repairs charged on the books of the plaintiff for the year 1926, to which the order of the Board of Review and Equalization transcribed in the Fifth Paragraph of this complaint refers, amount to the sum of \$133,700.61, of which amount, according to said order the item "improvements" to the value of \$18,208.78 should be stricken out, there remaining consequently as admissible deduction on this account, accepted by the Board of Review and Equalization, the sum of \$115,491.83.

IX. That as per the notice of deficiency dated October 31, 1928 served by the defendant on the plaintiff, the former accepted as a deduction, for repairs for the year 1926, the sum of \$51,216.65. and the Board of Review and Equalization by an order of December 23, 1929, transcribed in the sixth paragraph of this complaint, having determined that the plaintiff was entitled to a deduction of \$115,491.83 for repairs, that is, the total sum of \$133,700.61, appearing on its books as spent for repairs, less the item of \$18,208.78 for improvements stricken out by the Board of Review and Equalization, it is then evident that the plaintiff is entitled to an additional deduction for repairs for the year 1926 of \$64,275.18, that is the difference between the sum of \$115,491.83, specified in the eighth paragraph of this complaint, and the \$51,216.65 admitted by the treasury department in its notice of deficiency.

X. That in accordance with the ruling of the Board of Review and Equalization, rendered in the appeal taken by

the plaintiff, the liquidation of the net income and the income tax to be paid by the plaintiff for the year 1927, should have been as follows :

Net income on appeal to the Board as per notice of deficiency prepared by the department of finance, transcribed in the fifth paragraph of this complaint	\$215,725.26
Additional deduction granted by the Board as per its ruling of December 23, 1929 (as alleged in the ninth paragraph of this complaint)	<u>64,275.17</u>
Net income fixed as per ruling of the Board	\$151,450.09

[fol. 6]

Tax Liquidation

12½ per cent of \$147,450.08 (the net income less \$4,000 exempted by law)	\$18,431.26
Paid as per receipt No. 33 of the year 1927	<u>25,234.92</u>
Amount to be refunded to the plaintiff (plus the corresponding interest)	\$6,803.66

XI. That the plaintiff, once the appeal on the deficiency determined by the Honorable Treasurer of Puerto Rico was decided by the Board of Review and Equalization, filed before the latter officer in the month of February, 1930, a petition for refund or credit, which was decided by the Honorable Treasurer of Puerto Rico, the 28th of March, 1930, by granting to the plaintiff a credit or refund in the amount of \$525.56, instead of the sum claimed by the plaintiff in accordance with the above ruling of the Board of Review and equalization.

XII. That from the above decision of the Honorable Treasurer of Puerto Rico to the petition for refund or credit filed by the plaintiff, the latter appealed in April, 1930, to the Board of Review and Equalization; and the Board on August 22, 1932, decided the said appeal by affirming its original ruling of December 23, 1929, entered in the appeal taken with regard to the deficiency.

XIII. That the Treasurer of Puerto Rico in granting to the plaintiff a refund for taxes in the amount of \$525.56, plus \$60.61 for interest, instead of the \$6,803.66, plus the

interest claimed by the plaintiff, has done so in an arbitrary, unlawful, capricious and wilful manner, and without any authority or power to do so, thus altering and modifying the ruling of the Board of Review and Equalization and disobeying the terms of said ruling and if he had obeyed the ruling and had liquidated the tax in conformity with the terms of said ruling, as detailed in the tenth paragraph of this complaint, he would have ordered a refund to the plaintiff for the sum of \$6,803.66, plus interest.

Wherefore, the plaintiff prays this Honorable Court that judgment be rendered in due course sentencing the defendant [fol. 7] to refund or credit to the plaintiff the sum of \$6,803.66, plus the corresponding interest.

San Juan, Puerto Rico, July 11, 1933.

Mariano Acosta Velarde, Attorney for the Plaintiff.

Duly sworn to by Mariano Acosta Velarde. Jurat omitted in printing.

Copy served this eleventh day of July, 1933.

Charles E. Winter, R. Cordoves Arana, Attorneys for Defendant.

[fol. 8] [File endorsement omitted.]

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

DEMURRERS TO AMENDED COMPLAINT—Filed August 11, 1933

Now comes the defendant by his undersigned attorneys and in opposition to the amended complaint brought herein files demurrers thereto for the following grounds:

I. Because this court lacks jurisdiction by reason of the subject-matter to entertain this case, inasmuch as it does not appear from the complaint that the tax whose refund is claimed was paid under protest.

II. Because the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Wherefore, the defendant prays this Honorable Court that these demurrers be sustained and the complaint over-

ruled, with all other legal pronouncements, and sentencing the plaintiff to pay the costs of this suit.

San Juan, Puerto Rico, August 10, 1933.

Charles E. Winter, Attorney General. R. Cordoves Arana, Assistant Attorney General.

Copy served this tenth day of August, 1933.

Mariano Acosta Velarde, Attorney for the Plaintiff.

[File endorsement omitted.]

[fol. 9] IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

ORDER SUSTAINING DEMURRERS

From the averments of the amended complaint it appears that the payment of the income tax whose return in part is requested by the plaintiff, was made at the request of the Treasurer of Puerto Rico, without protest whatever, that is to say, voluntarily.

The plaintiff maintains in its brief that we are not dealing with an action for the recovery of taxes paid under protest, but with an action for the refund of taxes, based on Section 62-b of the Income Tax Law of 1925. While it is true that this section authorizes the initiation of a judicial proceeding for any part of the amount deducted by the Board of Review and Equalization, as a result of a claim in abatement of the deficiency assessed by virtue of Section 57-D, it does not authorize the court before which the judicial proceeding is brought to order the Treasurer to refund or return taxes paid in excess prior to the claim, when payment has been made without protest. See Section 76 of the aforesaid income tax law of 1925 and Act No. 8 of 1927, Section 3 of which "provided a manner of payment and right of action that was prospective and exclusive of previous manners". *Loiza Sugar Co. v. Domenech*, Treasurer, 45 P. R. R. —; *American Colonial Bank v. Domenech*, Treasurer, 43 P. R. R. —.

A perusal of the entire Section 62 above cited will clearly show that the claim in abatement is a procedure to be followed prior to the collection of the tax and that to stay the same till the final result of the claim a bond to answer for that part of the claim unabated, as well as the interest thereon, must be given.

The authorization granted to the Treasurer of Puerto Rico by Section 75 of the Act of 1925 "to remit, refund and

pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to the Legislature of Puerto Rico at the beginning of each regular session of all transactions under this section", does not authorize the court either to order the re-[fol. 10] fund of taxes not paid under protest; and if, as alleged in the amended complaint, the Board of Review and Equalization decided that the plaintiff is entitled to a refund of \$6,803.66 and that the Treasurer has not liquidated the credit accordingly, the remedy of the plaintiff is not to resort to the courts but to the Legislature. *Guerra v. Treasurer*, 8 P. R. R. 280; *Alonso Riera & Co. v. Benedicto, Treasurer*, 32 P. R. R. 98.

"Where The People of Puerto Rico has given its consent to be sued, in the cases, manner, place and courts prescribed by it, one who seeks to avail himself of such consent must pursue the remedy as it is provided by law, and must comply with the prescribed terms and conditions; otherwise the suit cannot be maintained." (*Nazario v. Gallardo, Treasurer*, 40 P. R. R. 760.)

The demurrers are hereby sustained and the plaintiff is granted a term of ten days to amend its complaint, if able to do so.

San Juan, Puerto Rico, November 4, 1933.

Pablo Berga, District Judge.

The parties were notified of the above ruling this sixth day of November, 1933.

Hector Gonzalez Blanes, Clerk.

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

MOTION FOR RECONSIDERATION OR IN DEFAULT THEREOF FOR JUDGMENT—Filed December 8, 1933

To the Honorable Pablo Berga:

Now comes the plaintiff in the above-entitled case by its undersigned attorney and respectfully states:

That an order was entered herein sustaining the demurrers filed by the defendant to the complaint in the case at

bar, this court holding in its said order among other things that the right to recover taxes is limited to those cases in which payment is made under protest, and that it did not appear from the complaint that the amount whose refund the plaintiff claims was paid under protest.

That this Honorable Court, in establishing the above theory, cited the following cases: *Loiza Sugar Company [fol. 11] v. Domenech*, 45 P. R. R. —; *American Colonial Bank of Puerto Rico v. Domenech*, 43 P. R. R.

That the cases of *Loiza Sugar Company v. Domenech*, 45 P. R. R. —, and *American Colonial Bank of Puerto Rico v. Domenech*, 43 P. R. R. —, are not applicable to the case at bar, inasmuch as the same refer to payments made by the taxpayer by virtue of a ruling of the Board of Review and Equalization, that is to say, after the taxpayer appealed to the Board, and the latter decided the appeal, the taxpayer paid without protest; while the payment made by the Yabucoa Sugar Company is distinguished from those made by the Loiza Sugar Company and the American Colonial Bank of Puerto Rico, because the Yabucoa Sugar Company paid, not by virtue of a ruling of a board, but by virtue of a mistake committed before the Board rendered its decision.

The plaintiff wishes to plainly state that by virtue of the provisions of Act No. 8 of 1927, in every tax paid excepting income tax, if the taxpayer wishes to attack before the courts of justice the payment of the said tax, he must do so by paying under protest, but as regards income tax the plaintiff insists that the only payment to be made by the taxpayer under protest, if he intends to impeach the validity of the payment, is that made by virtue of a ruling of the Board of Review and Equalization.

When a taxpayer appeals to the Board of Review and Equalization from a decision of the Treasurer, it is because he believes or thinks that the decision or assessment of the Treasurer is erroneous. The Government allows to the taxpayer a means of impeaching the assessment or ruling of the Treasurer, which means consists in an appeal to the Board of Review and Equalization. Once the case is decided by the Board, the ruling is *prima facie* correct inasmuch as the taxpayer has been given an opportunity to defend itself, and that is why Act No. 74 of 1925, under paragraph (a) of Section 76, grants him the right to pay

under protest if he wishes to impeach the payment and to file the corresponding suit within 30 days from the date of payment. The court will please notice that that is a payment made by the taxpayer by virtue of a ruling of the Board, and that he has to resort to court within 30 days. [fol. 12] We have already said that the cases of Loiza Sugar Company v. Treasurer, 45 P. R. R. —, and American Colonial Bank v. Treasurer, 43 P. R. R. —, are not applicable to the case at bar, because said cases refer to payments made without protest by the taxpayers by virtue of a ruling of the Board of Review and Equalization. We will point to the court what the Supreme Court decided in said cases.

In Loiza Sugar Company v. Treasurer, 45 P. R. R. —, we find the following:

“ * * * The corporation requested the Treasurer to reconsider the assessment of the tax but its request was denied and hence it appealed to the Board of Review and Equalization, the latter affirming the assessment of the Treasurer. Then the corporation paid \$2,621.38. *The payment of said tax was not made under protest.*” (Italics supplied.)

— This shows plainly that the \$2,621.38 were paid by the Loiza Sugar Company by virtue of a ruling entered on appeal to the Board and that the payment was not made under protest.

In American Colonial Bank v. Domenech, 43 P. R. R. —, the tax was paid under protest. A reading of that case does not show whether the tax paid by the American Colonial Bank was for income or for some other purpose, but we infer that the tax paid by the plaintiff was as income tax, inasmuch as at page — of volume 43 of the P. R. R. the following appears in the opinion of the court:

“Section 3 of Act No. 8 provided a manner of payment and right of action that was prospective and exclusive of previous manners. Hence a previous act requiring suit within thirty days after action by the Board of Review and Equalization was necessarily repealed.”

From that statement of our Supreme Court we infer that the tax paid by the American Colonial Bank in said case was for income and that payment was made after the Board

of Review and Equalization intervened by affirming the opinion of the plaintiff that payments of income tax made after the Board of Review and Equalization has acted must be made under protest, if the taxpayer wishes to impeach said payment before the courts, but that the payment made [fol. 13] by the taxpayer before the Board of Review and Equalization intervenes does not necessarily have to be made under protest to be questioned before the courts.

It is true that Act No. 8 of 1927 refers to the payment of taxes in general and that said act requires that payment be made under protest and grants a term of one year to attack before the courts of justice any such payments made under protest. The plaintiff, however, is of the opinion that, when income tax is involved, the law applicable to the case is Act No. 74 of 1925, and we are saying this because otherwise we would have certain precepts of the act of 1925 which could never be applied or enforced. Act No. 8 of 1927 must be construed in accordance with the precepts of Act No. 74 of 1925, and it is well known that in construing a statute validity and force, if possible, must be given to all its provisions. Under Section 62, paragraph (b), of Act No. 74 of 1925, any party may bring a judicial proceeding within one year after the rendition of the final decision by the Board of Review and Equalization. That means that Act No. 74, when one of the cases comprised under Section 62 is involved, fixes a term of one year after the decision of the Board, while Act No. 8 of 1927 specifies the term of one year after making payment. We also notice that Section 64, in its paragraph (b), grants the right to a credit or refund within four years after the date of payment, while under Act No. 8 of 1927 the claim before the courts must be made within one year from the date of payment under protest. Paragraph (b) of Section 64 of Act No. 74 of 1925, in so far as pertinent, reads:

“ * * * no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, * * * ”

In accordance with the averments of the complaint, it is plain that the plaintiff, within four years, filed its motion for refund with the Treasurer, appealed to the Board and the latter decided the matter in favor of the plaintiff, but

the Treasurer refused to acknowledge the decision of the Board, and according to Section 76, paragraph (a), the ruling [fol. 14] of the latter is final. Hence the taxpayer resorted to this court.

For the above stated reasons we are of the opinion that the cases cited by this Honorable Court to hold that a taxpayer who does not pay under protest is not entitled to impeach said payment before the courts are not applicable to the present case, inasmuch as they refer to cases where the taxpayer paid by virtue of a decision of the Board of Review and Equalization, while our case is covered by other provisions.

The ruling handed by this Honorable Court contains the following citations :

Guerra v. Treasurer, 8 P. R. R. 280. We do not consider this case applicable because the tax was a property tax and not an income tax, which is covered by a special act.

Alonzo Riera v. Benedicto, 32 P. R. R. 98. This case refers to a tobacco tax and not to an income tax.

Nazario v. Gallardo, 40 P. R. R. 760, is the last case cited. This also is a decision based on the payment of a tax on coffee and not on an income tax.

The plaintiff wishes to plainly state that when income tax is involved the laws applicable are the special acts on the subject, and hence it maintains that a taxpayer who has paid income tax through mistake or unjustly assessed, or in an excessive amount, may resort to court to obtain the refund or return of the amount erroneously or unduly paid there being no need of paying under protest.

In the memorandum submitted to this Honorable Court in support of our complaint we forgot to cite paragraph (b) of Section 76 of Act No. 74 of 1925, as follows :

“No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard. [fol. 15] and the regulations established in pursuance thereof.”

Paragraph (b) of Section 76 clearly grants to the taxpayer the right to resort to the courts to claim an amount erroneously or excessively paid, provided that the taxpayer has presented to the Treasurer a motion for refund and has appealed to the Board, as established by the law on the subject and by the regulations approved in accordance therewith.

The pertinent part of Section 355 of the regulations reads :

"Suit or proceeding for the recovery of any income or excess-profits taxes alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected can be maintained by the taxpayer when the requirements of either of the following methods of procedure have been fulfilled :

"1. When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may : (a) make a voluntary payment of the amount so determined (without filing an appeal from the Treasurer's determination of the tax to the Board of Review and Equalization) ; (b) file a claim for refund or credit with the Treasurer within four years from the time the tax was paid (see section 64-b ; (c)) if the claim is denied by the Treasurer, the taxpayer may bring an ordinary action before a court of competent jurisdiction to recover the amount so paid.

"2. . . .

"The preceding paragraphs of this article outline the only manner in which a suit may be brought by the taxpayer for the recovery of taxes erroneously or illegally assessed or collected, or penalties collected, without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any taxpayer bringing such suits or proceeding is required."

For the above stated reasons the plaintiff maintains that under the special income tax act—No. 74 of 1925—and under [fol.16] the regulations approved by virtue of the provisions of said act, it is entitled to resort to court once the Board of Review and Equalization decided its motion for the refund by the Treasurer of the amount excessive or erroneously paid, without need of having paid under protest.

Wherefore, we pray this Honorable Court that its ruling on the demurrers be reconsidered, and if this Honorable Court is of the opinion that reconsideration does not lie, then the plaintiff prays that judgment be rendered dismissing the complaint.

San Juan, Puerto Rico, December 8, 1933.

Mariano Acosta Velarde, Attorney for the Plaintiff.

Copy served this eighth day of December, 1933.

Benjamin J. Horton, R. Cordoves Arana, Attorneys
for the Defendant.

[File endorsement omitted.]

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

JUDGMENT

Considering the motion of the plaintiff praying that the ruling on the demurrers be reconsidered, or in default thereof that judgment dismissing the complaint be rendered, for the reasons stated in the order entered on November 4, 1933, sustaining the demurrers, which is made a part of this judgment, and considering, in reply to the arguments of the plaintiff in its motion for reconsideration, the fact that Section 62-b of Act No. 74 of 1925 and Section 355 of the regulations of the Treasury grant the right to bring judicial proceeding within one year after final decision of the Board in a claim in abatement, while Act No. 8 of 1927 specifies a term of one year after payment, in order to be entitled to bring suit, does not mean that in one case and the other payment should not be made under protest in order that the taxpayer may resort to court, in conformity with the provisions of Section 76-a of the aforesaid Act of 1925, it having been [fol. 17] decided that when the People has given its consent to be sued in the cases, form and tribunals by it determined, whoever wants to avail of that consent must ask for the remedy in the manner prescribed by law and comply with its term and conditions. (Nazario v. Gallardo, Treasurer, 40 P. R. 760.)

The court overrules the motion for reconsideration and the request of the plaintiff being considered, the complaint is dismissed without special pronouncements of costs.

San Juan, Puerto Rico, January 20, 1934.

Pablo Berga, District Judge.

Attest: Hector Gonzalez Blanes, Clerk.

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

NOTICE OF APPEAL—Filed February 27, 1934

To the Clerk of the District Court for the Judicial District of San Juan, Puerto Rico, and to the Honorable Benjamin J. Horton, Attorney General of Puerto Rico, as Counsel for the Defendant:

GENTLEMEN:

Please take notice that the Yabucoa Sugar Company, plaintiff in the above-entitled case, feeling aggrieved by the judgment rendered herein on January 20, 1934, and served on this party on the 31st of the same month and year, appeals from the said judgment in its entirety to the Supreme Court of Puerto Rico.

San Juan, Puerto Rico, February 27, 1934.

Mariano Acosta Velarde, Attorney for the Plaintiff.

Copy served this twenty-seventh day of February, 1934.

Benjamin J. Horton, R. Cordoves Arana, Attorneys
for the Defendant.

[File endorsement omitted.]

[fol. 18] IN SUPREME COURT OF PUERTO RICO

Civil No. 6657

YABUCOA SUGAR COMPANY, Plaintiff and Appellant

v.

MANUEL V. DOMENECH, as Treasurer of Puerto Rico,
Defendant and Appellee

Appeal from the District Court of San Juan

Refund of Taxes

JUDGMENT—July 28, 1936

Whereas this is a suit for the refund of income tax brought under Act No. 74 of 1925, and dismissed because said tax was not paid under protest; and

Whereas this court held on the 24th instant in Puerto Rico Fertilizer Co. v. Domenech, Treasurer, following that of

Compania Agricola de Cayey, Ltd., v. Domenech, Treasurer. 47 P. R. R. —, that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer;

Therefore, the appeal is dismissed and the judgment appealed from, rendered by the District Court of San Juan on January 20, 1934, is affirmed.

Let the parties be notified.

It was thus pronounced and ordered by the court as witness the signature of the Chief Justice. Messrs. Justices Cordova Davila and Travieso did not take part in this decision.

Emilio Del Toro, Chief Justice.

Attest: Joaquin Lopez, Secretary-Reporter.

[fol. 19] IN SUPREME COURT OF PUERTO RICO

MOTION FOR RECONSIDERATION

To the Honorable Court:

Now comes the Yabucoa Sugar Company, plaintiff and appellant in the above-entitled case, by its undersigned attorney, and respectfully states and alleges:

The plaintiff-appellant filed before the District Court of San Juan a complaint praying that the Treasurer of Puerto Rico be ordered to obey and give compliance to a ruling entered in favor of the plaintiff by the Board of Review and Equalization in an appeal taken thereto from a notice of the deficiency determined by the Treasurer of Puerto Rico.

The District Court of San Juan dismissed the complaint, and its judgment having been appealed to this Honorable Court, the latter affirmed the judgment of the court below on the following grounds:

"Whereas, this court held on the 24th instant in *Puerto Rico Fertilizer Co. v. Domenech, Treasurer*, following that of *Compania Agricola de Cayey, Ltd., v. Domenech, Treasurer*, 47 P. R. R. —, that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer."

The plaintiff-appellant prays that the judgment of this Honorable Court in the above-entitled case be reconsidered.

because it is of the opinion that its appeal cannot be decided on the grounds and reasoning of the case of Puerto Rico Fertilizer Co. v. Domenech, for the following reasons:

(a) Because in the above-entitled case the Yabucoa Sugar Company appealed to the Board of Review and Equalization from the notice of deficiency determined by the Treasurer of Puerto Rico and the Board decided the appeal in favor of the plaintiff.

(b) Because in the case of Puerto Rico Fertilizer Company the plaintiff did not appeal to the Board of Review and Equalization, and resorted only to the courts of justice from the adverse ruling of the Treasurer, for which reason [fol. 20] this Honorable Court decided "that without payment under protest resort may not be had to the courts of justice from the ruling of the Treasurer".

(c) Because the right of the Yabucoa Sugar Company, plaintiff-appellant, is based on the fact that the Treasurer of Puerto Rico has no power to dismiss or amend a ruling of the Board of Review and Equalization, which ruling in accordance with the law is final; while in the case of Puerto Rico Fertilizer Company the scope and consequences of a ruling of the Board of Review and Equalization was not involved.

(d) Because in the above-entitled case the Yabucoa Sugar Company exhausted the administrative proceeding fixed by law, by appealing to the Board of Review and Equalization, while in the case of the Puerto Rico Fertilizer Company the taxpayer resorted to the courts of justice without exhausting the administrative right of appealing to the Board of Review and Equalization.

(e) Because in the above-entitled case the Yabucoa Sugar Company appeared before the courts of justice in order that the Treasurer of Puerto Rico be ordered to give compliance to a ruling of the Board of Review and Equalization favorable to the plaintiff, while in the case of the Puerto Rico Fertilizer Company the taxpayer resorted to a court of justice from an adverse ruling of the Treasurer of Puerto Rico.

(f) Because the right of the appellant Yabucoa Sugar Company to obtain from the defendant Treasurer of Puerto Rico the refund of the additional credit granted by the Board of Review and Equalization—which had been denied by the

Treasurer—is acknowledged by law and accepted by this Honorable Supreme Court in the case of *Puerto Rico Fertilizer Company v. Domenech*, as follows :

“Should the Board decide the appeal in favor of the taxpayer no part of the deficiency determined by the Treasurer and denied by the Board will be levied, the Treasurer being entitled to bring an action within one year, before a district court of competent jurisdiction, without assessment, for the recovery of any part of the amount so denied. Of course in said suit the taxpayer will have the opportunity to defend [fol. 21] himself and the ruling that may be proper in accordance with the law and the facts will be rendered.”

The above paragraph shows that the rulings of the Board of Review and Equalization are final and that the Treasurer of Puerto Rico may not impose any deficiencies dismissed by the Board, nor amend or modify the rulings of the Board of Review and Equalization, although the law grants to the Treasurer the right to resort to the courts of justice, within one year from the decision of the Board, to claim from the taxpayer any deficiency determined by him and dismissed by the Board of Review and Equalization.

There is no question that under the facts averred in the complaint the Yabucoa Sugar Company obtained from the Board of Review and Equalization a ruling in its favor; but the Treasurer of Puerto Rico, instead of obeying and complying with the afore-mentioned ruling of the Board of Review and Equalization, attempted to amend and modify the same and refused to grant to the plaintiff the credit to which he was entitled according to the ruling of the Board of Review and Equalization. By reason of these circumstances the plaintiff resorted to the courts of justice with the object of having the Treasurer obey the ruling of the Board of Review and Equalization, inasmuch as said officer has not filed any suit against the plaintiff within one year from the rendition of the ruling by the Board.

In order that this Honorable Court may notice the great difference existing between the case of *Puerto Rico Fertilizer Co. v. Domenech* and the one at bar, we shall make hereinafter an extract of the complaint, as follows :

Let it be remembered that the Yabucoa Sugar Company appealed to the Board of Review and Equalization from a notice of deficiency made by the Treasurer of Puerto Rico

(see paragraphs IV, V and VI of the complaint). On December 23, 1929, the Board of Review and Equalization decided the appeal in favor of the plaintiff-appellant and determined that the latter was entitled, besides the deductions granted by the Treasurer in his deficiency return, to an additional deduction of \$64,275.18 for repairs. (See paragraphs VI and VII of the complaint.)

The appeal on the deficiency determined by the Treasurer [fol. 22] of Puerto Rico having been decided by the Board of Review and Equalization in favor of the plaintiff-appellant, the latter requested from the Treasurer in conformity with the aforesaid ruling of the Board of Review and Equalization, a refund or credit by said officer to the appellant of the amount determined by the Board of Review and Equalization. The Treasurer of Puerto Rico, instead of crediting the plaintiff with the sum of \$6,803.66 to which it was entitled, as per the ruling of the Board of Review and Equalization (see paragraph VII of the complaint), solely granted to the plaintiff the sum of \$525.56, and hence the plaintiff took a new appeal to the Board of Review and Equalization, and this entity on the 22d of August, 1932, decided the appeal of the plaintiff by affirming and ratifying in its entirety its original ruling of December 23, 1929. (See paragraphs XI and XII of the complaint.)

From the foregoing statement of facts it is evident that the Yabucoa Sugar Company requests that the Treasurer of Puerto Rico be ordered to obey and comply with the ruling of the Board of Review and Equalization entered in an appeal taken thereto, and that the Yabucoa Sugar Company be credited with the sum determined by the Board of Review and Equalization, the plaintiff-appellant by no means pretending the refund or return of any sum or amount of money denied to it by the Board of Review and Equalization.

This Honorable Court held in Puerto [Rico] Fertilizer Co. v. Domenech that "should the Board decide the appeal in favor of the taxpayer no part of the deficiency determined by the Treasurer and denied by the Board will be levied", and this is exactly what the Yabucoa Sugar Company prays from this court.

As this Honorable Court has admitted that, in the case of Puerto Rico Fertilizer Co. v. Domenech, the Treasurer shall not levy any part of the deficiency determined by him and denied by the Board, it is evident that the cause of action of the Yabucoa Sugar Company is unquestionable, inasmuch

as the Treasurer of Puerto Rico is bound to obey the rulings of the Board of Review and Equalization, and if he were allowed to amend or modify said rulings, the latter will not be final as established by law and the appeal granted to the taxpayer would be a fairy tale, for the taxpayer would always be subjected to the Treasurer failing to obey the ruling [fol. 23] of the Board, as it happens in the present case, and that the opinion of the Treasurer should always prevail in spite of the fact that the Board had said that his opinion was erroneous and mistaken.

For the above stated reasons, most respectfully we pray this Honorable Court the reconsideration of the judgment rendered in the above-entitled case.

San Juan, Puerto Rico, August 1, 1936.

Mariano Acosta Velarde, Attorney for the Plaintiff-Appellant.

IN SUPREME COURT OF PUERTO RICO

OPINION DELIVERED BY MR. JUSTICE WOLF—March 17, 1937

On the 28th of July, 1936, we held, in a *per curiam* decision, that the appellant in this case was bound to follow the lot of the taxpayer in the case of *Puerto Rico Fertilizer Company v. Domenech*, decided by this court on the 24th of July, 1936. The Puerto Rico Fertilizer Company moved for a reconsideration and obtained it. The present appellant was permitted to appear on the rehearing of the Puerto Rico Fertilizer Company case, *supra*, as *amicus curiae*. It had also previously presented a motion for reconsideration of our said *per curiam* decision.

The appellant attempts to distinguish its position in this case from that of the Puerto Rico Fertilizer Company. It maintains that, given the circumstances of the payment in the present case, the appellant, to recover from the Treasurer, was not bound to pay under protest.

We can realize that it would have been difficult or almost impossible at the time of payment of the taxes for it to know that it was paying the same in excess of the amount due. It is necessarily true that when a taxpayer makes a voluntary payment he is ordinarily not conscious that such a payment is an excessive one.

The appellant sought to recover the excess payment from the Treasurer. Under Section 75 of Act No. 74 of 1925

(Session Laws, p. 400), which under our most recent opinion (Puerto Rico Fertilizer Company v. Domenech) we have held the act to be applicable, the Treasurer is authorized [fol. 24] "to remit, to refund and pay back all taxes erroneously or illegally assessed or collected. * * *"

This is a discretionary matter in the treasurer and our direct decision in the Puerto Rico Fertilizer [Company] case is that the said section gives the taxpayer no additional right to file a suit for the recovery of taxes. It makes no difference what the method taken by the taxpayer in the Puerto Rico Fertilizer Company case was, for we feel bound to hold without special reference to the procedure in that case, that its reasoning and the reasoning of this case compels us to declare that the appellant is without remedy by suit.

Taxes voluntarily paid in the absence of a statute authorizing it can not ordinarily be recovered. *Little v. Bowers*, 134 U. S. 54; 61 C. J. 985. It is true that under Act No. 80 of 1919 a direct suit was allowed against the Treasurer to recover taxes voluntarily paid. Since 1921, however, the right to bring suits for the recovery of taxes other than those paid under protest has been abrogated. *Compania Agricola de Cayey, Ltd. v. Domenech*, 47 P. R. R. —. The mere fact that the Legislature gave a taxpayer the right to recover under certain circumstances does not confer that right under different circumstances, namely, when a person does not pay under protest.

By legislative enactment a payment under protest is a condition precedent to recovery by suit.

The motion for reconsideration should be denied.

Adolph G. Wolf, Associate Justice.

IN SUPREME COURT OF PUERTO RICO

ORDER DENYING MOTION FOR RECONSIDERATION—March 17,
1937

For the reasons stated in the foregoing opinion, the motion for reconsideration is hereby denied.

It was so ordered by the court as witness the signature of the Chief Justice.

Emilio Del Toro, Chief Justice.

Attest: Joaquin Lopez, Secretary-Reporter.

[fol. 25] [Memorandum.—Petition for appeal filed May 22, 1937; order allowing appeal, dated May 24, 1937; citation, dated May 25, 1937, returnable in sixty days; cost bond for \$300, Adolfo Gorbea and Juan I. Gorbea, sureties; and order approving bond, dated June 23, 1937, are here omitted. A. I. Charron, Clerk.]

IN SUPREME COURT OF PUERTO RICO

ASSIGNMENT OF ERRORS—Filed May 22, 1937

To the Honorable Supreme Court of Puerto Rico:

Now comes Yabucoa Sugar Company, by its undersigned attorney, and files the following assignment of errors upon which it will rely on appeal to the United States Circuit Court of Appeals for the First Circuit:

I. The Supreme Court of Puerto Rico erred in holding that plaintiff-appellant was not entitled to the refund claimed since payment was not made under protest.

II. The Supreme Court of Puerto Rico erred in applying to this case Section 75 of Act No. 74 approved August 6, 1925, instead of applying Sections 64, 55 and 76 of said act

III. The Supreme Court of Puerto Rico erred in holding that plaintiff-appellant was without remedy by suit to recover the refund claimed in the complaint.

Wherefore, the appellant prays that the decree rendered in said cause by the Supreme Court of Puerto Rico be reversed and the cause remanded, with instructions as to further proceedings, and for other and further relief as may be just in the premises.

San Juan, Puerto Rico, this twenty-first day of May, 1937.

Mariano Acosta Velarde, Attorney for Appellant.

Notified with copy on this the twenty-first day of May, 1937.

B. Fernandez Garcia, Attorney General of Puerto Rico, Attorney for Defendant-Appellee.

[fol. 26] Translator's certificate to foregoing transcript omitted in printing.

IN SUPREME COURT OF PUERTO RICO

STIPULATION AS TO TRANSCRIPT OF RECORD

Comes now the plaintiff-appellant and the defendant-appellee in the above-entitled case, by their undersigned attorneys of record, and respectfully state and stipulate:

1. That the foregoing papers and proceedings had in the above-entitled case are true, complete and faithful copies of their respective originals, as the same appear on file and of record in the clerk's office of the Supreme Court of Puerto Rico.

2. That the defendant-appellee has received a copy of said transcript of the record, and both parties have agreed that it be sent to the United States Circuit Court of Appeals for the First Circuit at Boston, Mass., same to constitute the transcript of the record in this case for the purposes of the appeal taken by the plaintiff-appellant, it being unnecessary that the translation be certified by the official interpreter and translator of the Supreme Court of Puerto Rico.

San Juan, Puerto Rico, August 5, 1937.

Mariano Acosta Velarde, Attorney for Appellant.

B. Fernandez Garcia, R. Cordoves Arana, Attorneys for Appellee.

[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

[Memorandum.--An order of enlargement of time for docketing case to, and including, September 22, 1937, is here omitted. A. I. Charron, Clerk.]

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

MINUTE ENTRY OF HEARING

On January 26, 1938, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIRST CIRCUIT, OCTOBER TERM, 1937

No. 3274

PORTO RICO FERTILIZER COMPANY, Plaintiff, Appellant,

v.

RAFAEL SANCHO BONET, Treasurer, Defendant, Appellee

No. 3285

YABUCOA SUGAR COMPANY

v.

SAME

Appeals from the Supreme Court of Puerto Rico

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed July 13, 1938

BINGHAM, J.:

These are two appeals from judgments of the Supreme Court of Puerto Rico involving similar questions of law under the Insular Income Tax Act approved August 6, 1925. The facts are to be gathered from the complaints to which demurrers were filed, on the ground that they did not state a cause of action.

By the statute the taxpayer was required to file a return (37 (a), 39 (a) (b), and 27 (a)) and to pay the tax (53 (a) (b)) computed by the Treasurer upon the face of the return (54) without formal assessment.

In the complaint of the Fertilizer Company it was alleged that between June, 1926, and June, 1932, it returned and paid as withholding agent, income taxes on payments of [fol. 30] interest made by it to the Virginia-Carolina Chemical Corporation, amounting to \$42,300; that the Act required this to be done (35); that it required all persons making payments of interest to deduct and pay over to the Treasurer a stated percentage of such interest as a tax, not on the person making the payment, but on the person receiving such payment; that such taxes as applied to the Chemical Company were illegal and unauthorized because neither

the Chemical Company nor the loans made by it to the plaintiff ever had a taxable situs in Puerto Rico (*Domenech v. United Porto Rican Sugar Company*, 62 Fed. (2d) 552); that in October, 1933, the plaintiff filed claims for refund of the payments for these years with the Treasurer under the law of 1925; and that all the claims were denied by the Treasurer. All the taxes, refund of which was claimed by the Fertilizer Company, were of this character. Each payment of interest by the Fertilizer Company was made the subject of a separate count or claim. As to the payments made more than four years before the petition for refund was filed, it was conceded in the argument before the Supreme Court that they were barred by special limitation of the statute (four years after payment of the taxes, (Sec. 64 (b)), and they are no longer insisted on.

This case stands on the three last payments, which aggregated about \$20,000.

After the Treasurer had denied its claims for refund the Fertilizer Company brought the present suit in the District Court for San Juan, without having appealed from the Treasurer's denial of the claims to the Board of Review and Equalization, and, as above stated, the court dismissed its complaint.

In *Domenech v. United Porto Rican Sugar Co.*, 62 Fed. (2d) 552, this court held that the provisions of the Puerto Rico statute taxing payments of interest to non-residents was unconstitutional and, certiorari having been denied, that decision stands. It follows that the taxes on such payments of interest were illegal and constituted overpayments. Of this there can be no question.

In the *Yabucoa* case, the appellant filed returns showing ordinary income taxes to be due and paid such taxes without protest. Later the Treasurer determined a deficiency tax [fol. 31] against that company amounting to \$1,301.51 (Sec. 57 (a) (b)). From this determination (not assessment) the Sugar Company appealed to the Board of Review and Equalization which disallowed the deficiency and found that there had been an overpayment of general income taxes on its return of \$6,803.66. A claim for refund of this amount was thereupon filed with the Treasurer by whom it was disallowed. From this disallowance an appeal was taken to the Board of Review and Equalization (Sec. 76 (b)), which again found there had been an overpayment. The Treasurer still refusing to make refund, the present

suit was brought by the Yabucoa Company in the District Court of San Juan, which decided against it.

It thus appears that the plaintiff in each case is seeking to recover a refund of taxes paid on its return filed in the normal course with the Treasurer,—the Fertilizer Company on the ground that the tax thus collected was illegal and void in toto, and the Yabucoa Company on the ground that the tax collected was excessive; and that, in the Yabucoa case, the plaintiff appealed from the Treasurer's denial of its claim for refund before bringing suit, while the Fertilizer Company did not. In no other particular do the rights of the plaintiffs to maintain their causes of complaint differ. Otherwise stated, the plaintiffs in both cases are seeking a refund of taxes returned in the usual way, not assessed, and paid without protest, the only difference between them being that in the Yabucoa case, after denial of its claims for refund by the Treasurer, that company appealed to the Board of Review and Equalization before bringing suit, while the Fertilizer Company did not.

It is entirely clear that the provisions of Section 76 (a), when read in connection with Section 57 (a) and (b) relate to deficiency taxes, which have been levied (assessed) against the taxpayer within five years after his return was filed as provided in Section 60 (a) (1), and that the provision in Section 76 (a) that "the taxpayer shall pay under protest such tax" has to do only with a suit brought to test the validity of an assessed deficiency and to recover the whole or any part of the tax held to be invalid.

In the Yabucoa case, as the taxpayer filed its return in the usual way and paid the tax imposed by the statute and, [fol. 32] within four years from the time of payment (Section 64 (b)), presented its claim for refund to the Treasurer, who denied it, and appealed therefrom to the Board of Review and Equalization, the sole question is whether it can maintain a suit against the Treasurer under 76 (b) to recover what is justly due it, the tax having been paid without protest.

Section 76 (b) provides:

"(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to

have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

The plain meaning of this provision is that a suit may be maintained for the recovery of income taxes erroneously or illegally collected, provided a claim for refund has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal; there is no condition or proviso requiring that the tax in such case shall have been paid under protest. Section 76 (b) expressly recognizes that regulations interpreting it may be necessary. Section 68 authorizes the Treasurer "to prescribe needful rules and regulations for the enforcement of the Act"; and, on May 17, 1926, the Treasurer promulgated a regulation stating that a suit or proceeding for the recovery of an income tax erroneously or illegally collected could be maintained by the taxpayer (a) by making a voluntary payment; (b) by filing a claim for refund within four years from the time of payment; and (c) if the claim was denied by the Treasurer, the taxpayer could bring an ordinary action before a court of competent jurisdiction to recover the amount so paid. The only trouble with this regulation construing Section 76 (b) is that it authorized a suit to be brought upon the mere filing of a claim for refund with the Treasurer rather than after an appeal to the Board of Review and Equalization. The regulation expressly recognizes that in such [fol. 33] case payment under protest is not necessary. Its only defect, as we view it, is in failing to give effect to the express language of Section 76 (b) which calls not only for the presentation of a claim for refund to the Treasurer but also to the Board of Review and Equalization on appeal.

Section 55 provides, in substance, that if the taxpayer has paid more than the amount of the tax "determined" to be correct (that is, determined by the Treasurer and Board of Review and Equalization on appeal) the excess over the amount so determined "shall be credited or refunded" as provided in Section 64; and Section 64 (a) provides that where such an overpayment has been made "the amount of such overpayment shall be credited against any income or excess-profits tax or installment thereof then due

from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer." Section 75 authorizes the Treasurer "to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, or penalties collected without authority, and all taxes that appear to be unjustly assessed and excessive in amount, or in any manner wrongfully collected."

It thus appears that Section 76 (b) was intended to authorize the maintenance of a suit against the Treasurer, in case he refused to pay back the illegal or excessive tax collected, as he was authorized and directed to do under Sections 75, 55, and 64. It certainly could not have been the intention of the law maker to leave the payment of the taxpayer's just claim solely to the whim of the Treasurer.

In fact we fail to see how the law-making body could have enacted Section 76 (b) with any other purpose in view than as authorizing a suit (conditioned as above stated) in case the Treasurer refused payment.

In these cases the court below did not attempt to give any rational meaning or construction to the provisions of 76 (b) but treated the cases as though no such provision as Section 76 (b) existed; and, having wiped the Section off the statute book, and failed to recognize any distinction between a suit to recover a refund and one to test the validity of a deficiency assessment, it held that the former [fol. 34] could not be maintained unless the tax was paid under protest, as required by 76 (a) in the case of deficiency assessments.

We think this holding is manifestly wrong; that Section 76 (a) and 76 (b) relate to distinct matters and that the provision for payment under protest in Section 76 (a) applies only to suits for the recovery of deficiency assessments to which the provisions of 76 (a) relate.

We do, however, think that the provision in Section 76 (b) requiring an appeal to the Board of Review and Equalization is a condition precedent to the maintenance of a suit under that section and the Fertilizer Company not having taken such an appeal cannot maintain its suit.

In No. 3274 the judgment of the Supreme Court of Puerto Rico is affirmed.

In No. 3285 the judgment of the Supreme Court of Puerto Rico is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

CONCURRING OPINION

WILSON, J. (concurring):

I concur in the result of the opinions of Judge Bingham in these cases on the grounds set forth below.

The two cases present somewhat different state of facts, but involve similar questions and the same sections of Act 74 of the Laws of 1925 of Puerto Rico, hereinafter referred to as the Act, relating to income taxes, and may be disposed of in one opinion.

The intent of the statute, though inartistically worded in some particulars, is clear when considered in its entirety. Substantially all income and excess-profits taxes are without doubt paid voluntarily on their due date, without the necessity of levy, assessment or any other kind of action on the part of the Treasurer or Collector. That is what the Legislature intended. It is the procedure adopted by the Federal Income Tax laws, and is of substantial benefit to the public treasury, making available for public purposes [fol. 35] ascertainable income at definite dates, which taxpayers must pay or become liable for penalties and interest.

Neither the treasury department nor the taxpayers are, however, infallible upon a complicated subject such as income taxes, and the Treasurer of Puerto Rico is required as soon as is practicable to examine the taxpayer's return and determine whether he has paid the correct amount of tax. The law contemplates that overpayments made by the taxpayer shall be returned, and that underpayments shall be collected. The Act sets up a procedure by which the taxpayer can compel the return of overpayments, and by which the Treasurer can compel the payment of the correct amount of the tax in case of underpayments.

The intention of the Legislature to encourage taxpayers to pay what they think is owing, upon the assurance that it will be refunded if found to be in excess of what is properly due, is manifest from the Act, and the requirement for payment under protest as a condition precedent for a suit to recover is limited only to those cases in which the taxpayer has been put upon notice by receipt of a notice of deficiency and that his determination of his own tax has been contested.

The statute should be interpreted with this intent in mind.

The plaintiff in the first case, the Porto Rico Fertilizer

Company, hereinafter referred to as the Fertilizer Company, filed a return for the several years from 1924 to 1931, both inclusive, showing interest paid each year on money borrowed of a Virginia corporation and used in Virginia or other places in the United States for the purchase of materials to be used in its business.

The petition of the taxpayer alleged that the Treasurer of Puerto Rico notified the plaintiff that he had assessed against the plaintiff according to its returns the several amounts provided by the Act, which it paid voluntarily and without protests as a withholding company for the Virginia company (Sec. 22). The defendant demurred to the petition.

Eight actions were brought by the Fertilizer Company against the Treasurer of Puerto Rico to recover the sums illegally collected by him for the several years in question, [fol. 36] but abandoned its first five causes of action as being prescribed by Section 64 (b) of the Act.

The District Court of San Juan held that, since the taxes were not paid under protest, as provided in Section 76 (a) of the Act, as a condition of bringing suit against the Treasurer, and as no appeal had been taken to the Bureau of Review and Equalization from the refusal of the Treasurer to refund the sum erroneously collected, the plaintiff could not recover.

On appeal to the Supreme Court of Puerto Rico, that Court sustained the judgment of the District Court. "For the reason that the payment was not made under protest, and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed."

Since the cases were presented on demurrer, the allegations of the complaints must be taken as containing all the facts. It is alleged in the Fertilizer case that the Treasurer notified the taxpayer that he had assessed the taxes therein set forth. The sums alleged as assessed were voluntarily paid and without protest, though the statute imposing the taxes in December, 1932, was held by this Court to be invalid under the Organic Act of Puerto Rico, as imposing taxes on non-residents upon income outside the Island. *Domenech v. United Porto Rican Sugar Co.*, 62 Fed. (2d) 552.

It is clear that the sums so paid were not in the nature of deficiency taxes under Sections 56 and 57 of the Act, but may be treated as an overpayment under Sections 23(b) and 64 of the Act. The plaintiff requested that the sums

aid by it be refunded, presumably under Section 75 of the Act, which was refused by the Treasurer, but the plaintiff did not appeal therefrom to the Board of Review and Equalization.

While the Income Tax Acts of 1919 and 1921, when examined in their entirety, were also intended to provide for the assessment, payment, and the determination of income taxes by the Treasurer, and an adjustment of any differences by an appeal to a Board of Review and Equalization, and an appeal to the Courts, see Sections 57-63, and Section 66 of the 1919 Act, and Sections 42-47 of the 1921 Act. The [fol. 37] Legislature by the Act of 1925 attempted to clarify certain provisions of the prior Acts.

However, the procedure under the Income Tax Act of 1919, 1921 and 1925 has been so confused by the decisions of the Supreme Court of Puerto Rico that, while ordinarily this Court will follow the interpretation of the law of Puerto Rico by the Insular Supreme Court, we think we are warranted in determining, without regard to the many conflicting decisions of the Insular Supreme Court, what seems to us to be the intent of the Insular Legislature in the passage of Act 74 of the Laws of 1925 so far as it affects the decision of these cases.

Sections 22, 27 (a), 37 (a) 39, 53, 54, 55, 56, 57, 64, 75 and 76 of the Act of 1925 are clearly intended to provide for returns by taxpayers (Secs. 22, 37); the voluntary payment by the taxpayer of the tax provided by law according to his return within a specified time (Sec. 53); the examination of his return by the Treasurer (Sec. 54); and if he finds on examination of the return, or from any additional evidence, that the sum voluntarily paid by the taxpayer was less than the amount due from the taxpayer, the Treasurer then notified the taxpayer of the determination of a deficiency tax (Sec. 57); and if he finds that the taxpayer has overpaid the sum due from him (Secs. 55, 64), any such overpayment shall be refunded immediately to the taxpayer.

In case the Treasurer, upon the examination of a return, finds that the sum paid by the taxpayer is less than the sum due from him as taxes under the Act, and determines that a deficiency exists and notifies the taxpayer of such deficiency, the taxpayer may, within thirty days, file an appeal with the Board of Review and Equalization (Sec. 57(a)), the decision of which is final. The amount so determined

by the Board shall be assessed by the Treasurer (Sec. 57 (b)).

In case an overpayment is not refunded as provided in Section 23(b) and 64, and the taxpayer under Section 75 applies to the Treasurer, who is authorized to make the refund, and the Treasurer refuses for any reason, as in case a dispute exists as to the amount of the overpayment, the taxpayer under Section 76 (b) may appeal to the Board [fol. 38] of Review and Equalization, and if the Board of Review finds that there was an overpayment and the Treasurer still refuses to refund the amount of overpayment determined by the Board, it is clear, we think, that a suit may be brought to recover.

It is clear that the Fertilizer Company neither paid under protest the taxes involved in the action brought by it, nor did it appeal from the Treasurer's refusal to make a refund to the Board of Review. It had a remedy at law, if it had followed the provisions of the Act. Mandamus does not lie to compel action by an official where the law provides a remedy.

The Treasurer, however, without warrant of a legal statute, collected the taxes for the years 1929, 1930 and 1931; as a result an action at law existed against the Treasurer, *Jimenez v. Domenech*, 80 Fed. (2d) 767, 768, for money had and received, which appears to be provided for in Sections 1795-1801 of the Civil Code of Puerto Rico. Also see *Sage et al. v. United States*, 250 U. S. 33; *George Moore Ice Cream Co., Inc. v. Rose, Collector*, 289 U. S. 373; *United States v. Hvoslef*, 237 U. S. 1.

The plaintiff's present action is, however, based on Act 74 of the Laws of 1925, and since it has not complied with its provisions, the judgment of the Supreme Court of Puerto must be affirmed with costs, not to include counsel fees.

The case of the Yabucoa Sugar Company, hereinafter referred to as the Sugar Company, presents a somewhat different state of facts from that in the case brought by the Fertilizer Company.

From the complaint in this case, to which a demurrer was filed by the defendant, it appears that on the return of the plaintiff filed with the Treasurer, no tax was at first assessed against the plaintiff, but the plaintiff at the request of the Treasurer voluntarily paid the amount due according to the return. Later the Treasurer, having practiced an investigation of the books of account of the Yabucoa

ugar Company, a notice of a deficiency tax of \$1,301.51 was prepared by the Treasurer and was served on the plaintiff October 31, 1928.

From this notice of a deficiency tax the plaintiff appealed to the Board of Review and Equalization, which found that [fol. 39] there was no deficiency but an overpayment by the plaintiff of \$6,803.66, which was made at the request of the Treasurer on its original return. The plaintiff then filed a petition with the Treasurer for refund and credit, who granted a refund of \$525.56 instead of the amount found to have been overpaid by the Board of Review; whereupon the plaintiff again appealed from the decision of the Treasurer to the Board of Review. The Board confirmed its prior decision on the former appeal, whereupon the plaintiff brought this action to recover of the Treasurer the sum found to have been overpaid by the Board of Review and Equalization.

The District Court of San Juan held that, inasmuch as the taxes involved were not paid under protest, no recovery could be had. The Supreme Court on appeal affirmed the judgment of the District Court and held that under Section 75 of the Act of 1925, the Treasurer having refused to make the refund, there was no redress for the taxpayer by applying to the courts; that Section 75 gave to the Treasurer sole discretion as to whether he would allow a refund in any case. We think this interpretation of Section 75 is not warranted. Section 64 requires a refund of any overpayment. No discretion is imposed in the Treasurer as to whether he will grant it or not. In case a question is raised as to the amount of the overpayment, the Treasurer may refuse to grant a refund according to the plaintiff's claim, but the taxpayer may appeal to the Board of Review, the decision of which is final, which was done in this case.

There appears to be no question but that the plaintiff has complied with all the necessary requirements of the Act, including Section 76 (b), for bringing a suit to recover the overpayment found by the Board of Review.

It had the right of appeal to the Board of Review on two grounds: (1) from the decision of the Treasurer refusing to grant a refund of the overpayment, and (2) from the Treasurer's determination of a deficiency tax of \$1,301.51. Section 76 (b) clearly implies that a suit may be brought to recover any sum found to be due by the Board of Review as an overpayment.

Since the Board found that no deficiency tax was due [fol. 40] and its decision is final, there was no occasion for the plaintiff to pay under protest the sum levied by the Treasurer as a deficiency tax. Any other interpretation of the Act permits no effect to be given to Section 76 (b), or to the provisions of Section 64, which provides that all overpayments, after crediting the amount to any other tax due for a different year, shall be returned to the taxpayer.

It is unnecessary to consider the effect of Act 8 of the Laws of 1927, since the Supreme Court of Puerto Rico has finally concluded that that Act, as this Court indicated in its opinion in *Domenech v. Verges*, 69 Fed. (2d) 714, 716, in no way modified or repeals any provision of the Act of 1925, which is a complete Act in itself for the assessment and collection of income taxes.

DISSENTING OPINION

MORTON, J. (dissenting):

There is no disagreement as to the general scheme of the statute under discussion. Income taxes imposed by it fall into two classes (1) those shown to be due on the face of the return, and paid voluntarily without objection or protest, (2) those collected on deficiency assessments. In regard to the latter there are careful and adequate provisions. (Sections 57 and 76 (a).) If deficiency assessments are objected to the taxpayer may appeal to the Board of Review; if the Board of Review decides against him he must pay, and may sue in the courts to recover back the alleged illegal exaction.

The present case does not relate to deficiency taxes; it concerns only taxes which were voluntarily paid without protest and deals only with claims for refund. The statute provides very specifically for the return of overpayments without any requirement of objection or protest against the original payment. (Sections 53, 64.) These sections apply to voluntary overpayments, made presumably by mistake on the part of the taxpayer. It also authorizes and directs the Treasurer to repay erroneous or illegal collections and to report annually to the Legislature his transactions under this authority. (Section 75.) While no express provision is [fol. 41] made therefor it is not doubted that a person who

has voluntarily overpaid his tax may apply to the Treasurer under these sections for a refund; and it is clearly the Treasurer's duty if overpayment is established to make a proper refund. The crucial question is who is to determine whether there has been overpayment of a tax voluntarily paid, i. e. to pass on such claims for refund.

The statute makes only one reference to them. (Section 76 (b)*). The present case involves the correct construction of this subsection. At first reading it appears to be a limitation or restriction on suits for the recovery of overpayments, already authorized elsewhere in the statute. It says in effect that no suit shall be maintained in any court until a claim for refund shall have been filed with the Treasurer and on appeal with the Board of Review "*according to the provisions of law in that regard and the regulations established in pursuance thereof.*" The difficulty is that there are no provisions of law authorizing suits in court for the recovery of taxes voluntarily paid or empowering the Board of Review to deal with claims for refund on appeal from the Treasurer, or with taxes which have been paid. I agree with my brother Bingham that section 76 (a) relates only to deficiency assessments and payments, and is of no assistance. The reference to suits in court and to appeals to the Board of Review although in the negative form might possibly have been construed as conferring by implication the jurisdiction now held to exist in the Board of Review and in the Courts if these references had not been limited as they are very expressly by the last clause in the sub-section. It seems clear that provisions assumed to be in the statute are absent. My brethren elaborate 76 (b) to include by [fol. 42] construction what they suppose the omitted provisions to have been. Even so there remain unsolved diffi-

* "No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

culties. If the Board of Review decides in favor of the taxpayer what happens? The Supreme Court of Puerto Rico evidently felt that the mistake was the other way, i. e. in allowing section 76 (b) to stand, when the provisions to which it refers were elided. The Supreme Court accordingly held that with respect to voluntary overpayments the taxpayer was in the hands of the Treasurer on matters of refund, "if the decision of the Treasurer is against him he cannot appeal from the same to Courts of justice." This does not seem to me an unreasonable solution of the difficulty which confronted them. Indeed I incline to think it was right. Under the view, taken in the majority opinions, every tax which has been voluntarily paid without protest may be reopened on claims for refund at any time within four years and resettled de novo in court proceedings. This is in fact what is approved by the decision in the Yabucoa Sugar case before us. Greater consideration is shown to voluntary overpayments than to deficiency assessments. This certainly is a wide departure from the view of the Supreme Court of Puerto Rico. It has often been said that in matters of local law the opinion of that court is not to be set aside unless clearly wrong. As I have said I incline to think the Supreme Court of Puerto Rico was right; I certainly do not think it was clearly wrong.

In the Fertilizer Company case there was clearly an overpayment of tax which it was the Treasurer's duty to recognize and refund. His refusal to do so is on the facts before us a clear breach of his statutory duty. No attempt is made to defend it. The Fertilizer Company had no right to bring suit on its claim for refund. Its remedy appears to be a suit against the Treasurer for mandamus to compel him to perform his statutory duty. *Lane v. Hoglund*, 244 U. S. 174; *Dismuke v. United States*, 297 U. S. 167.

In the Sugar Company case the claim for refund rested on changes in income or deductions made by the taxpayer after the tax had been voluntarily paid. They were not approved by the Treasurer. It does not appear that the Sugar Company's claim was established beyond fair doubt nor that it was clearly the duty of the Treasurer to accept it.

I think both judgments should be affirmed. In the case of the Fertilizer Company with leave to bring further proceedings by mandamus or otherwise as advised.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—July 13, 1938

This cause came on to be heard January 26, 1938, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, July 13, 1938, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is vacated and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

[fol. 44] Thereafter, to wit, on August 13, 1938, mandate issued to the Supreme Court of Puerto Rico.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby extended for a period of fifty (50) days from October 13, 1938.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

Dated this 6th day of October, 1938.

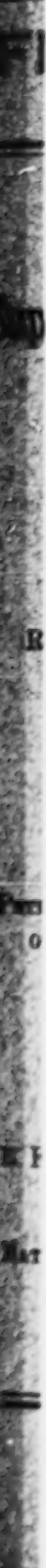
[fol. 46] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 30, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter William Cattron Rigby. File No. 42,983. U. S. Circuit Court of Appeals, First Circuit. Term No. 498. Rafael Sancho Bonet, Treasurer of Puerto Rico, petitioner, vs. Yabucoa Sugar Company. Petition for a writ of certiorari and exhibit thereto. Filed December 2, 1938. Term No. 498, O. T., 1938.



R

0

K F

MAT

MICROCARD

TRADE MARK 

22



MICROCARD[®]
EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHE
201 TWENTY-SIXTH STREET, N.W. WASHINGTON, D.C. 20037 PHONE 202 333-6393

376

38-99

